United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4049,4061,4074

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS, INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

-and-

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
XEROX CORPORATION,
HAWAIIAN TELEPHONE COMPANY,
AMERICAN PETROLEUM INSTITUTE,
Intervenors.

PETITION FOR REVIEW OF A REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR XEROX CORPORATION

Of Counsel:

BERNARD J. LONG, JR.
CHARLES H. HELEIN
MARSHALL E. BERMAN
– and –
PHILIP E. SMITH
KENNETH H. KLEIN
XEROX CORPORATION
Stamford, Connecticut 06904
(203) 329-8711

DOW, LOHNES & ALBERTSON
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 659-8200
Attorneys for Intervenor Xerox Corporation.

Dated: September 10, 1976

B
Pls

Washington, D.C. • THIEL PRESS • (202) 638-4521

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS, INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

-and-

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
XEROX CORPORATION,
HAWAIIAN TELEPHONE COMPANY,
AMERICAN PETROLEUM INSTITUTE,

Intervenors.

PETITION FOR REVIEW OF A REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR
XEROX CORPORATION

TABLE OF CONTENTS

Introduction 1

The Underlying Public Necessity 1

Point I

The Commission's Action Should Be Affirmed as the Lawful Exercise of Its Informed Discretion in Regulating, Pursuant to Established Precedent, the More Effective Use by the Public of AT&T's MTS Network 8

Point II

The Record Below is Sufficient to Sustain the Limited Judgment Made That the IRCs Failed to Carry the Burden Required to Overcome the Inherent Public Interest Benefits to be Achieved by Permitting Broader Public Access to the AT&T MTS Network 11

Point III

Public Benefits Should Not be Delayed Solely on Petitioners' Premature Allegations Concerning Inter-connection and Anti-competitive Effects Which are not a Proper Part of This Record and Which Ignores the Commission's Continuing Authority and Involvement in International Communications 16

Conclusion 21

Table of Authorities

Cases:

American Telephone & Telegraph Co. v. United States, 229 U.S. 232 (1936) 8

Bell System Tariff Offerings, 46 FCC 2d 413 (1974); aff'd sub nom, Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F.2d 1250 (3rd Cir. 1974), cert. denied, sub nom, American Tel. & Tel. Co. v. F.C.C., ___ U.S. ___, 95 S.Ct. 2620 (1975) 18

Columbus Broadcasting Coalition v. F.C.C., 505 F.2d 320 (D.C. Cir. 1974) 18

Cornell University v. U.S., 427 F.2d 680 (2d Cir. 1970). 18

Florida Gulf Coast Broadcasters, Inc. v. F.C.C., 325 F.2d 726 (D.C. Cir. 1965) 15n

Green v. F.C.C., 447 F.2d 323 (D.C. Cir. 1971) . . . 18

Hush-A-Phone v. United States, 238 F.2d 266 (D.C. Cir. 1956) 9,14

National Association of Theatre Owners v. F.C.C., 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) 8

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 8,19

Red River Broadcasting Co. v. F.C.C., 98 F.2d 282 (D.C. Cir. 1938) 15

Specialized Carriers, 29 FCC 2d 870 (1971), aff'd sub nom, Washington Utilities Com'n v. F.C.C., 513 F.2d 1142 (9th Cir. 1975) cert denied, 423 U.S. 836 (1975) 17,18

United States v. Mid-West Video Corp., 406 U.S. 649 (1972) 8

Valley Telecasting Co. v. F.C.C., 326 F.2d 914 (D.C. Cir. 1964) 15n

WEBR v. F.C.C., 420 F.2d 158 (D.C.Cir. 1969) 15n

Table of Authorities

Statutes:

47 U.S.C. §151(a) 9

47 U.S.C. §303(g) 9

Administrative Rules:

Federal Communications Commission
Rule Making Proceedings
47 C.F.R. §1.415(d) 14n

INTRODUCTION

This brief is submitted on behalf of Xerox Corporation, Intervenor herein ("Xerox"), which has a direct and substantive interest in the outcome of this review. It was by virtue of its inquiry of the Federal Communications Commission ("FCC") some five years ago that the proceedings before that agency were instituted[1/] and the Report and Order now under review was adopted.[2/] As a manufacturer of data terminals,[3/] Xerox is obviously interested in maximizing the market potential for its products, as are other manufacturers of similar terminal equipment. On a less parochial basis, terminal equipment users are clearly being frustrated in their desires for a lower-cost, equally efficient means to transmit data, facsimile and record signals to overseas points on the same scale they now do domestically.

THE UNDERLYING PUBLIC NECESSITY

Essential to a proper perception of the paramount public interests involved in this case is the recognition of the following factors. First, there is an urgent, unmet public need for increased international non-voice record

---

1/ Letter of June 17, 1971, to FCC from Xerox (J.A. 42-44).
2/ Report and Order in Docket 19558, released January 19, 1976 (J.A. 1-9), and reported in 57 FCC 2d 705
3/ Xerox terminals access a transmission network by transmitting signal into or receiving signal from the network.

communications capabilities. Second, this need can now be met by use of an existing communications network. Third, the only impediment to the use of such network is an artificial regulatory barrier which has outlived its usefulness. And fourth, any resultant private detriment that might be sustained by removal of outdated regulatory restrictions can have no decisional significance so long as there are clear and unambiguous public benefits achieved.

Simply stated, the current disparity between the lower-cost, more efficient service for non-voice transmissions rendered domestically and that rendered internationally is due to the availability to domestic users of the American Telephone and Telegraph Company's ("AT&T") message toll switched network ("MTS"). Until the instant Report and Order, FCC policies precluded AT&T from using its international MTS for other than voice and program transmission services (J.A. 1). As the international record carriers ("IRC"), Petitioners herein, point out, international record traffic has by FCC policies been an exclusive service of the IRCs.[4/] Hence, in order for a user with a Xerox Telecopier to reach an overseas point, he must first transmit the message to a gateway city of an IRC (e.g., New York, Washington, D.C., or San Francisco) where the message is

---

4/ Petitioner IRCs: ITT World Communications, Inc. ("ITT Worldcom"); RCA Global Communications, Inc. ("RCA Globcom"); and Western Union International, Inc. ("WUI").

recorded by the IRC and then retransmitted from the gateway city to the overseas point. This mode of "stop-over" transmission causes loss of time, decreased flexibility in communicating, lower message quality, reduced confidentiality of communications and greatly increased costs.

In consequence, Xerox requested the FCC to consider removing the regulatory limitations to the public's use of AT&T's international MTS. Such action permits overseas transmission of data, facsimile and record signals, alternately with voice, and at regular message rates. The underlying public necessity which Xerox finds implicit in the FCC's action may be more fully elucidated by a brief description of the nature, extent and meaning of the services sought by Xerox, and authorized by the FCC. (Cf. Comments of Xerox at J.A. 28-53.)

The marketability of Xerox terminals, such as the modified Telecopier 200 and 400 facsimile machines now being developed, is directly related to their cost effective use. That use is affected in turn by the transmission systems such terminals may access and the rates charged and regulations on usage or access contained in published tariffs. However, due to inherent problems in currently available access to international systems, such as the "stop-over" transmission problem cited above, while IRC service has been available for facsimile transmission for

several years, and Xerox developed its Telecopier V unit to be compatible with facsimile equipment marketed by foreign firms for international transmissions, less than 100 customers and less than 10 "major accounts" of Xerox have taken the Telecopier V unit. Xerox believes that the combination of decreased efficiency in communications via IRC systems, coupled with much higher rates, has produced the limited acceptance of the Telecopier V unit.

Moreover, ignoring the lack of efficiency in presently available systems, a user of a Telecopier V unit accessing an IRC system today would pay rates under the DATEL tariff[5/] of as high as 100% more than he would pay AT&T for similar service by accessing AT&T's overseas MTS lines. Moreover, rather than being able to combine voice and pictorial representation, diagram or schematic description of his communications, as he would using AT&T's overseas MTS, a user with a joint voice-facsimile communications need would have to terminate his voice communications with his overseas party and wait until the IRC reconnected from its central office to the overseas party in order to provide the facsimile transmission service. The user would then have to re-establish voice contact via AT&T's overseas MTS.[6/]

5/ The IRCs' current service offering for international record services (J.A. 1).

6/ The position of the Petitioner IRCs that the inefficiency of this "stop-over" transmission can be eliminated through interconnection of IRC facilities with AT&T's domestic MTS will be addressed hereinafter.

In addition to increased costs, time delays and administrative difficulties, the alternatives to use of AT&T's MTS international network for facsimile communications are in many cases simply inadequate. Teletype communication[7/] provides no capability for transmitting exact graphic information which complicates or hinders effective communication with certain countries due to language differences. For example, a Telex system has no way of indicating the placement of unique accent marks utilized in foreign languages. Tabulated figures and Chinese or Japanese ideographs cannot be transmitted via Telex. Utilization of teletypewriting systems requires rekeyboarding of the transmission with the possibility of resultant errors from human inattention, inadvertence, or distraction. Additionally, the only way to transmit a signature in international commerce is by facsimile.

Messenger service to overseas destinations is unduly and often prohibitively expensive for low volume users. Mail service is often too slow for international commerce.[8/]

Available DATEL service, besides being more costly and administratively slow, provides no effective service for

---

7/ Referred to as Telex under IRC tariffs (J.A. 1).
8/ Xerox's experience has been that letter delivery from Dallas, Texas to the United Kingdom normally requires 10 days, one way.

the occasional user with an overseas facsimile need. Moreover, some parts of the world are not accessible to DATEL.[9/] For example, there is no DATEL to Brazil and certain of the Arab and African Nations. A facsimile user is therefore barred from transmitting facsimile to such countries unless he is willing to risk breaching AT&T's tariffs which restrict foreign communications to voice-only traffic.

If, as Xerox believes, and will more fully support hereinafter, there is adequate basis to sustain the FCC's action, not only will present overseas communications capabilities be enhanced, but future development of more flexible, more sophisticated and less costly facsimile and other system applications will progress. Currently, efforts are underway to design modifications to existing terminals in order to increase or provide for compatibility with foreign manufactured terminals. These efforts have been undertaken under the auspices of CCITT.[10/] User access to AT&T's international MTS will greatly enhance the possibilities of establishing greater compatibility.

In addition, a new automatic dialing accessory now marketed for use with Xerox's most advanced facsimile product permits a sender to pre-program calls to various locations

---

9/ AT&T's overseas MTS is normally available to such areas.
10/ The International Telegraph and Telephone Consultative Committee of the International Telecommunication Union.

where compatible facsimile equipment is placed. With the availability of AT&T direct dial-up service to many foreign countries, this device allows the operator to program the sending machine so that documents are transmitted during non-peak hours or times during which business is conducted in overseas locations. Since DATEL service requires intervention by the IRC in order to access their lines, the automatic dialing accessory could not be used when communicating with foreign countries. If this new flexibility is lost due to inability to access AT&T's overseas MTS, the user with international needs is forced to communicate during normal overseas business hours which provide an extremely narrow "window" in the U.S. working day when communications may be effected.

Xerox submits that consideration of the underlying public need for better international record service is essential to a proper balancing of the competing interests under review. Xerox submits that in its Report and Order the FCC correctly weighed those needs and its action should be sustained as being in furtherance of its statutory directives.

Xerox shall briefly address certain specific issues concerning the correctness of the Commission's action. It will not attempt to treat every issue nor to respond to every point raised in the Petitioners' Briefs. Xerox believes the FCC and AT&T will adequately discourse on all

relevant points. In the interest of avoiding repetitious argument, Xerox defers to the Respondents' Briefs on those points not addressed herein.

POINT I

THE COMMISSION'S ACTION SHOULD BE AFFIRMED AS THE LAWFUL EXERCISE OF ITS INFORMED DISCRETION IN REGULATING, PURSUANT TO ESTABLISHED PRECEDENT, THE MORE EFFECTIVE USE BY THE PUBLIC OF AT&T'S MTS NETWORK.

It is well-established precedent that a reviewing court is to give great deference to the informed discretion and special expertise of an administrative agency in determining, within its sphere of expertise, wherein the exact public interest may lie. National Broadcasting Co. v. United States, 319 U.S. 190, 224 (1943); American Telephone & Telegragh Co. v. United States, 229 U.S. 232, 236 (1936); United States v. Mid-West Video Corp., 406 U.S. 649 673-674 (1972); National Association of Theatre Owners v. Federal Communications Commission, 420 F.2d 194, 204 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970). In removing an artificial restriction against the broader and more flexible use of AT&T's total MTS system, the FCC properly exercised its expert judgment in the field of telecommunications which unequivocally encompasses the international communications sphere. By formulating a revision in its policy in response to specific expressed public need, the FCC took action which fully comports with its statutory directives--

> ". . . to make available so far as possible, to all the people of the United States a rapid, efficient . . . world-wide wire and radio communications service with adequate facilities at reasonable charges . . . (47 U.S.C. §151(a))

and to

> . . . generally encourage the larger and more effective use of radio in the public interest . . ." (47 U.S.C. §303(g)).

It carried out these responsibilities by enlarging the uses to which the public could put the world-wide network of AT&T.

The FCC not only further advanced the performance of its statutory duties, but conformed fully to established precedent. As clearly stated in its decision, the Commission's overriding consideration was not to further extend the communications dominance of AT&T (as the Petitioners seek to persuade this Court),[11/] but rather to permit the public to make more flexible and better use of the public international switched message telephone system. In Hush-a-Phone v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956), the landmark principle as to the Commission's regulatory responsibilities vis-a-vis the switched telephone network was established. The Commission is to make no decision nor adopt any rule or policy which constitutes an unwarranted interference with the telephone subscriber's right to reasonably use his telephone ". . . in ways which are privately beneficial without being publicly detrimental."

11/ E.G., Brief, ITT Worldcom, pp. 19-24, 26-38; Brief, RCA Globcom, pp. 37-48; Brief, WUI, pp. 18-26.

Having been convinced of the growing need for increased international communications flexibility and lower service costs for data, facsimile and record communications, which the IRCs do not dispute (J.A. 2, 94-112, Comments of ITT Worldcom; 222-227, Comments of RCA Globcom), the Commission ruled to remove an artificial restriction on the use of the international MTS network. It made this point pivotal to its action--

> . . . we believe the overriding consideration in this inquiry is in meeting an unmet need by giving the added flexibility to the customer to use the international switched message telephone system for both voice and data, similar to their authorized use of the domestic telephone network. Such a use would be privately beneficial without being publically [sic] detrimental and consistent with our long held view that the public's use of the public network should be made as flexible as possible (J.A. 6).

The Report and Order, read in this light, requires affirmance. Conceding the need for better international non-voice communications, and recognizing the ease by which this could be accomplished by simply removing a purely outdated and artificial restriction on the use of plant and facilities already fully capable of meeting that need without major rebuild, redesign or investment, is not action suited to nor intended to broaden the pervasiveness of AT&T in the communications industry. The Commission has merely allowed the public to start to use that unused capacity which has, since the development of dataphone-type services, always been there. If the IRCs are to demonstrate that by

permitting the more effective use of a national resource without costly additions of plant or equipment is opening the gate to a publicly detrimental competitive threat, the duty to make that showing is on them and clearly requires them to meet a substantial burden.

POINT II

THE RECORD BELOW IS SUFFICIENT TO SUSTAIN THE LIMITED JUDGMENT MADE THAT THE IRCs FAILED TO CARRY THE BURDEN REQUIRED TO OVERCOME THE INHERENT PUBLIC INTEREST BENEFITS TO BE ACHIEVED BY PERMITTING BROADER PUBLIC ACCESS TO THE AT&T MTS NETWORK.

A reading of the record in this case discloses no substantive evidence that actually supports the "expressed fears" of the IRCs. The Commission cannot ignore a clear public need, nor its obligation to find the means to fulfill that need, solely on the conjecture of the IRCs that somehow, somewhere, AT&T will damage their operations. For the FCC to respond to such speculative fears would be all the more a miscarriage of its regulatory responsibilities in view of the fact that the public's interest supersedes the purely private interests of the IRCs. As the Commission itself points out (J.A. 8), the IRCs are not entitled to a protective umbrella so long as the public suffers no diminution in service.

As opposed to facts, statistics and other documentation of their feared competitive impact, over the five years that have elapsed since this was first brought under FCC scrutiny, the IRCs offered no better a case than, for example, describing the size of AT&T and bemoaning the supposed ability of AT&T to cross-subsidize its services.[12/] RCA Globcom contented itself with a similar approach of forecasting competitive doom without any effort to support those dire predictions with hard specific facts and studies. Rather, RCA assumed the correctness of the very point it carried the burden to prove.

> There is no question but that the implementation of overseas switched voice/data services via the overseas telephone network will have an adverse affect upon other services now provided by the international voice/record carriers . . . To allow AT&T entry into this market for such new services which can be expected to impact such important existing services [of the IRCs] is tantamount to insuring the inevitable undermining of the international voice/record carrier industry as it now exists. [RCA Globcom Comments (J.A. 190-191)]

Having assumed the verity of what the IRCs considered the single most important focal point on the question of the Commission's removing the voice-only restrictions on AT&T's use of its overseas MTS, the IRCs then offer only further conjecture about the possibility of further anti-competitive maneuvers of AT&T. The IRCs cite what are no

---

12/ E.g., IT&T Worldcom Comments (J.A. 88-89).

more than general broad policy statements about the proper control of AT&T's monopoly position.[13/] But any broad policy judgment must be tempered by direct relation to specific circumstances. Unless clearly related to specific matters before the Commission requiring resolution, such generalized judgments cannot properly control each and every judgment on the vast spectrum of uses of the communications systems which have been entrusted to the FCC to regulate. As this case demonstrates, such a non-thinking application of general concepts could well work to the detriment of meeting specific, attainable and visible public needs.

The Petitioners' complaints concerning the hiatus between the filings of comments and the Commission's decision is similarly without merit. Although Xerox, as a member of the public long aware of unmet communications needs, asked for relief five years ago, the IRCs now claim the Commission "rushed to judgment" (Petitioner RCA Globcom Brief, p. 49) and bitterly complain that the Commission erred in not permitting them to update the record. Xerox believes the IRCs have no basis upon which to sustain their complaints.

The passage of time between the filings and the decision can be viewed as benefitting the Petitioners in

---

13/ Such as, for example, the IRCs' citation of the Intragovernmental Committee on International Telecommunications (RCA Globcom Comments (J.A. 194)).

that it afforded them more than ample opportunity to supplement their case and build a factual record of support. The fact that they did not is telling witness to what is otherwise obvious. Other than hand-wringing fears, there is little factual basis to overcome the clear duty of the Commission to maximize the public's use of the MTS network, as established in Hush-A-Phone, supra.[14/] That no such supplemental filings were attempted or requested during the three and one-half year period until the eleventh hour,[15/] and then without any more factual basis than given in the formal comments, must be read adversely to the Petitioners' position on this issue--

> The right to administrative relief is a privilege afforded by law to persons who consider themselves interested or aggrieved. Unless the interests of such a person are brought to the attention of the Commission through established procedural channels, it will be impossible for it to give them proper consideration. The Act and the rules

---

14/ It may be noted that although the normal pleading cycle provided under Commission rules had ended, Rule 1.415(d) specifically provides that additional comments may be filed if ". . . specifically requested or authorized by the Commission" (47 C.F.R. §1.415(d)).

15/ See Letters at J.A. 396-401; 406-413. It is instructive that in these requests to supplement the record only three months before a decision was scheduled and nearly thirty-two months after final reply comments were filed (J.A. 367-370), the Commission is asked to consider, not more facts or evidence on AT&T's competitive impact in the context of overseas dataphone service, but rather AT&T's alleged refusals to provide interconnection to the IRCs, coupled with a request to defer all action in order to consider proceedings in another Docket, Docket 18875.

> of the Commission have made adequate provision therefor. The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. It is more reasonable to assume . . . a legislative intent that an interested person should be alert to protect his own interests than to assume that Congress intended the Commission to consider on its own motion the possible effect of its action in each case, upon every person who might possibly be affected thereby. Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation. (Red River Broadcasting Co. v. Federal Communications Commission, 98 F.2d 282, 286-287 (D.C. Cir. 1938) 16/

If the IRCs were serious as to the actuality of the event of their alleged competitive harm, why was no effort made from the final formal filing in 1973 until shortly before the Commission was ready to act on the basic policy question which had been pending before it for several years? In the words of the Red River Broadcasting, supra

---

16/ The case involved a broadcast licensee who did not avail himself of participation before the FCC on the grant of a license to a new station. The resolution turned on the doctrine of exhaustion of administrative remedies. Nonetheless, we believe the quoted language is most appropriate and provides substantive precedent for the proper treatment of the IRCs' claim as to the inadequacy of the record before the FCC. See also, WEBR v. F.C.C., 420 F.2d 158 (D.C. Cir. 1969); Florida Gulf Coast Broadcasters, Inc. v. F.C.C. 325 F.2d 726 (D.C. Cir. 1965); Valley Telecasting Co. v. F.C.C., 326 F.2d 914 (D.C. Cir. 1964).

why was it not the duty of the IRCs ". . . to act affirmatively to protect . . ." themselves? Clearly it would be contrary to orderly administrative processes and the proper dispatch of the Commission's public interest obligations for the Commission to be required to allow open-ended proceedings to continue on indefinitely solely on the unsubstantiated requests of parties to "supplement" their cases.

POINT III

PUBLIC BENEFITS SHOULD NOT BE DELAYED SOLELY ON PETITIONERS' PREMATURE ALLEGATIONS CONCERNING INTERCONNECTION AND ANTI-COMPETITIVE EFFECTS WHICH ARE NOT A PROPER PART OF THIS RECORD AND WHICH IGNORE THE COMMISSION'S CONTINUING AUTHORITY AND INVOLVEMENT IN INTERNATIONAL COMMUNICATIONS.

The record is clearly sufficient to sustain the action taken and the limited policy judgment which it entails. First, it is clear that while the Commission has decided the public interest requires removal of the regulatory restriction on non-voice transmissions over AT&T's international MTS, it has not in fact authorized AT&T as yet to commence such service.[17/] Secondly, the IRCs are attempting to raise an issue which is not properly part of this proceeding--the issue of AT&T's response to the FCC's statement of policy on interconnection of AT&T's domestic MTS with the IRCs' gateways.

17/ AT&T's 214 application, File No. I-P-C-12, is pending (P.A. 105) and the IRCs have duly protested that application (P.A. 115-192).

Whether or not the marriage of the international networks of the IRCs with AT&T's domestic MTS network would equalize the competitive positions of AT&T and the IRCs for overseas non-voice services is not now before this Court. Those issues, and their bearing on the alleged anti-trust or competitive issues raised by the IRCs, will not be decided until after AT&T refuses to provide any interconnections ordered by the Commission pursuant to the requests for same which are now also pending before the Commission (P.A. 1-62).

At its disposal in meeting any proven public need for broader interconnection of facilities between AT&T and the IRCs, the Commission has a substantial arsenal of regulatory tools. The Commission may first of all condition AT&T's 214 authorization, if granted under application I-P-C-12, on AT&T's expanding its interconnection to the IRCs. The Commission has expressly indicated it would consider doing so as need required (J.A. 9). To the extent AT&T refuses to provide such interconnections, the 214 application may be denied, deferred or revoked. The IRCs also may rely on the more recently enunciated policies of broader interconnection now in effect domestically as embodied in the "specialized carrier" decisions and as sustained by the courts. Specialized Carriers, 29 FCC 2d 870 (1971); aff'd sub nom, Washington Utilities & Transp. Com'n v. F.C.C., 513 F.2d 1142

(9th Cir. 1975), cert. denied, 423 U.S. 836 (1975); and Bell System Tariff Offerings, 46 FCC 2d 413 (1974); aff'd sub nom, Bell Telephone Co. of Pennsylvania v. F.C.C. 503 F.2d 1250 (3rd Cir. 1974); cert. denied, sub nom, American Tel. & Tel. Co. v. F.C.C., ___ U.S. ___, 95 S. Ct. 2620 (1975).

Any prior history of interconnection problems with AT&T must be considered irrelevant in light of the interconnection policy enunciated in this and other Commission actions. Any actions of AT&T in response to new interconnection policies adopted or developed in light of the removal of the regulatory restrictions on non-voice overseas service by AT&T are events and occurrences which can form no part of the instant record.

Precedent indicates that the Courts are loath to consider questions not previously presented to the agency whose action is under review. Cornell University v. U.S., 427 F.2d 680 (2d Cir. 1970); Columbus Broadcasting Coalition v. F.C.C., 505 F.2d 320 (D.C. Cir. 1974); Green v. F.C.C., 447 F.2d 323 (D.C. Cir. 1971). Here the issue of interconnection and its anti-trust or competitive consequences as framed by the IRCs was not and could not have been before the FCC. Unless and until the FCC grants AT&T's 214 application without properly conditioning that grant on required

interconnection with the IRCs there is no injury sustained and no justiciable issue presented.[18/]

The IRCs' fears of future competitive impact are akin to many previous attempts by segments of regulated industries to avoid the most remote possibility of being disadvantaged privately by regulatory actions designed to foster a public good. For example, the networks years ago challenged the chain broadcasting rules on much a similar basis. The Supreme Court, recognizing the flexibility of the administrative process and its capacity to shift direction when developments require, and the impossibility of accurately forecasting future repercussions in dynamic industries from various regulatory programs, held, Mr. Justice Frankfurter delivering the Opinion of the Court:

> The Commission . . . did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the public interest is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations. National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943).

18/ Xerox does not concede that such interconnections are required before AT&T's 214 application is granted. Xerox would of course favor enforcement of any interconnection policy which would expand the facilities for overseas non-voice transmissions without being publicly detrimental. On the other hand, it would not serve the public interest if AT&T overseas dataphone service is delayed pending resolution of the interconnection issues. Indeed, it would be a public disservice to delay implementation of overseas dataphone service for the interconnection dispute to be settled.

Should the 214 application of AT&T be granted and the IRCs remain dissatisfied with their right to interconnect with AT&T, they may then seek judicial review of those precise facts and issues. In short, the IRCs have not presented a convincing case that they have been hurt by anything the FCC has done to date, or, if so, that it matters in a broader public interest context.

Indeed, the Commission in its Report and Order has engaged in only two decisions, both of which are fundamentally sound: to promote the public's use of AT&T's public switched network for overseas non-voice communications in order to meet unmet public demand; and, to consider the need, upon proper showings, for additional interconnection of the IRCs' facilities with AT&T's based on established policies. On the basis of this analysis, Xerox submits that the Commission's action should be sustained as a proper exercise of its expertise. The record is devoid of any compelling evidence of outright harm or serious threat of harm to the public interest in overseas communications as a result of the removal of a purely regulatory restriction which presently interdicts the larger and more effective use of AT&T's international MTS network in ways which are privately (and publicly) beneficial without being publicly detrimental. In the event that the future provides concrete cases of the theoretical harm or mischief forecast by Petitioners, the Commission has all the statutory authority and regulatory expertise to adjust its policies to meet such circumstances.

CONCLUSION

The Commission's Report and Order is a mere reaffirmation of established precedent that the public switched telephone network should be utilized to the greatest extent possible to meet the public's communications needs so long as that use involves no countervailing public detriment. The record establishes no danger of adverse consequences to the public from the action taken. The dangers perceived by Petitioners, to the extent they can eventually be documented, may be handled by future regulatory action and present no justiciable issue for this Court in this appeal.

The Commission's Report and Order should be affirmed.

Respectfully submitted,

DOW, LOHNES & ALBERTSON
Attorneys for Intervenor
Xerox Corporation
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036
(202) 659-8200

Of Counsel:
Bernard J. Long, Jr.
Charles H. Helein
Marshall E. Berman
-and-
Philip E. Smith
Kenneth H. Klein
Xerox Corporation
Stamford, Connecticut 06904
(203) 329-8711

Dated: September 10, 1976

CERTIFICATE OF SERVICE

I do hereby certify that two copies of Brief for Intervenor Xerox Corporation in Docket Nos. 76-4049, 4061 & 4074 were this day served by First Class Mail, postage prepaid, upon the counsel listed below:

General Counsel
Federal Communications Commission
Attorney for The Federal
Communications Commission
1919 M Street
Washington, D. C. 20554

Attorney General of the United States
Department of Justice
Antitrust Division
Attorney for United States of America
Washington, D. C. 20530

LeBoeuf, Lamb, Leiby & MacRae
Attorneys for
ITT World Communications, Inc.
140 Broadway
New York, New York 10005

Cahill, Gordon & Reindel
Attorneys for
RCA Global Communications, Inc.
80 Pine Street
New York, New York 10005

Stroock, Stroock & Levan
Attorneys for
Western Union International, Inc.
61 Broadway
New York, New York 10006

Alfred B. Walton, Esquire
Randall B. Lowe, Esquire
Attorneys for Intervenor
American Telephone & Telegraph Company
32 Avenue of The Americas, Room 2544
New York, New York 10013

(Continued)

Keller and Heckman
Attorneys for Intervenor
American Petroleum Institute
1150 - 17th Street, N. W.
Washington, D. C. 20036

Chadbourne, Park, Whiteside & Wolff
Attorneys for Intervenor
Hawaiian Telephone Company
1150 - 17th Street, N. W.
Washington, D. C. 20036

Dated at Washington, D. C.

This 10th day of September, 1976

Janice G. Robinson

Janice G. Robinson
DOW, LOHNES & ALBERTSON
1225 Connecticut Avenue, N. W.
Suite 500
Washington, D. C. 20036